No. 590.
Brief of Farrar, Brumbaugh
Beckwith for P.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Mar. 10, 1902.

No. 590.

THE NEW ORLEANS WATER WORKS COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF LOUISIANA ET AL.

MOTION TO REFUSE TO CONSIDER MOTIONS TO DISMISS OR AFFIRM HEREIN, OR TO GRANT TIME TO PRINT RECORD IN No. 591 AND FILE BRIEFS IN THAT CASE.

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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 590.

THE NEW ORLEANS WATER WORKS COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF LOUISIANA ET ALS., DEFENDANTS IN ERROR.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes The New Orleans Water Works Company, plaintiff in error, and prays the court to refuse to hear or to take into consideration at this time the motion to dismiss or affirm herein made by The State of Louisiana *et al.* and fixed for hearing on Monday, March 10, 1902, by an *ex parte* notice under rule sixth of the general rules of this court, or, if this motion is denied, to grant counsel for plaintiff in error until the first Monday in April to print the record on their writ of error, and to submit briefs.

STATEMENT IN SUPPORT OF MOTION.

The judgment of the Louisiana supreme court refusing the rehearing was rendered and the decree of that court became final on February 3, 1902.

On February 10 Mr. Justice Peckham granted the writ of error applied for by the New Orleans Water Works Company. The return day of that writ is March 12.

On February 4, before the writ of error was applied for and one day after the judgment of the supreme court of Louisiana was rendered, defendants in error printed and obtained the certificate of the clerk of the supreme court of Louisiana to a copy of the pleadings had in the lower court and a copy of the opinions of the supreme court on appeal. This so-called record does not and could not contain either the writ or the assignments of error.

On February 12, two days after the writ of error was granted and the very day the writ was lodged in the supreme court of Louisiana and before the citations in error were served, defendants in error served on plaintiff notice that on Monday, March 10, it would submit a motion to dismiss or affirm.

In the meantime counsel for plaintiff in error have been using every effort to get the enormous *real record* in this cause ready for filing in this court on the return day. It was handed to them by the clerk of the supreme court of the State of Louisiana on Saturday, March 9, a few hours before it was time to take a train for Washington. It was filed in this court on Monday, March 10, under the number 591, and under the style of New Orleans Water Works Company

vs. The State of Louisiana *et als.* The defendants in error docketed the case in which they made their motion under the number 590 and under the same style. As stated above, there is no writ of error in this record No. 590 and no assignment of errors. It does not even contain the defendants' petition for rehearing denied by the Louisiana supreme court, and in which complaint was made that the court had ignored the Federal questions raised by the defendants.

The clerk of this court states to counsel that it will require at least three weeks to print the record in cause No. 591, which is the only cause which contains the real record, with all pleadings, evidence, opinions, the assignment of errors, the writ of error, and the citations in error.

We respectfully submit that in a case involving more than $2,000,000, where the pleadings bristle with Federal questions raised by the defendant, so that they lay across every avenue of approach to every point in the case in such a manner that there was no dignified way to decide the case against defendants without deciding these questions or some of them, and where, in spite of this, the opinion of the appellate court practically confiscates the property of the defendants without even formulating or deciding these necessarily preliminary questions, the court will not take the case on a motion to dismiss or affirm upon any such record as the defendants in error have brought here, and under the conditions of time and circumstance under which the motion was made.

For the reasons above given, counsel for the plaintiff in error have found it impossible to prepare briefs for this early date. The briefs of the defendants in error are meagre, and do not comply with the rules of this court, in that none of the many statutes of the State of Louisiana which constitute

the charter of the plaintiff in error, and others which bear thereon, and the interpretation of which constitute this cause, are not printed in the briefs or in the record.

We are not resisting this motion for purposes of delay. We are resisting it because of the condition of the record and briefs on which it is proposed to submit it.

We therefore ask the court to decline to take the motion of the State of Louisiana and others to dismiss the writ of error herein, or to affirm the judgment of the supreme court of Louisiana, made in cause No. 590, reserving to the movers the right to make such motion in cause No. 591 whenever the record in said cause shall be printed.

If the court should decline this counter-motion, then we ask a delay until the first Monday in April, within which we can have the real record in cause No. 591 printed, and prepare and submit to the court briefs which comply with its rules, and which will enable the court properly to examine a cause in which such large and important interests are involved.

It is true that this court has held that it will hear a motion to dismiss or affirm before the return day of the writ (*Ex parte* Russell, 13 Wall., 671; Thomas *vs.* Wooldrige, 23 Wall., 283; Clarke *vs.* Hancock, 94 U. S., 493); but those decisions were all rendered when writs of error were returnable only once a year, in October; but now that writs are returnable within thirty days, the reasons given by the court for this doctrine, established in *Ex parte* Russell (*supra*), do not apply.

In this case the court said:

"It is suggested that a party wishing to move the dismissal of an appeal is obliged to await the arrival of the

term to which the record ought to be returned, which occasions great delay. But as the case is virtually in the possession and subject to the control of this court as soon as the appeal is effectively taken, we see no reason why the appellee should not at any time when the court is in session, apply to have the appeal dismissed, provided the question can be properly presented to the court. Of course the court would not hear the motion without having the record before it; but that could be procured and presented by the appellee as is done where the appellant has failed to have the record filed in due time. In many cases the court might decline to hear the motion until the record were printed; but that could also be done by the appellee, if he desired to have a speedy hearing of the matter. Unless some unforeseen inconvenience should arise from the practice, we shall not refuse to hear a motion to dismiss before the term to which, in regular course, the record ought to be returned. It would be likely to prevent great delays and expense, and further the ends of justice."

In all of the cases above quoted the record was before the court printed by the defendants. In this case the record is not before the court, and the defendants have not brought up and printed the record, but the appellant has, with extraordinary diligence, brought this enormous record here itself and filed it before the return day and had it properly docketed. This record is not printed and is not before the court in this cause.

Respectfully submitted.

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